REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

ELRC CAUSE NO. 73 OF 2015

PETER MARANDO NYABERI BICHUNGI…..…CLAIMANT

VERSUS

VALLEY BAKERY LIMITED....…..…..……1ST RESPONDENT

VALLEY CONFECTIONARY.……...……2ND RESPONDENT

RULING

1. Before me for determination is a notice of motion dated 15th day of March, 2019, filed by the defendant (hereinafter referred to as the applicant) through the firm of Konosi and company Advocates seeking orders *inter alia* that:-

a) The service of this application be dispensed with and or reasons to be recorded it be certified urgent and be heard ex parte in the first instance.

b) That this Honourable Court be pleased to review and set aside the ex parte proceedings of 14th March, 2018 and reopen the proceedings herein.

c) That the Honourable Court be pleased to order the claimant's witness be recalled for purposes of cross-examination and thereafter the respondents do file the necessary documents and present their case.

d) That the costs of this application be provided for.

2. The application is expressed under the provisions of Article 159(1)(d) of the Constitution, Sections **3, 12 and 16** of the Employment and Labour relations Court Act, Rule 33 of the Employment and Labour relations Court (Procedure) Rules 2016 and all other enabling Provisions.

3. The application is grounded on the grounds stated on the face of the application and the annexed affidavit of the Applicant' Advocates on Record **Mr. Wilfred N. Konosi** sworn on 15th March,2019**.** Essentially the grounds relied upon by the applicant are: -

a) That the respondent's advocates on record received a mention notice on 15th March, 2019 from the claimant advocates that the matter shall be mentioned on 28th March, 2019 for the purpose of filing submission for the main suit.

b) That the advocates of the respondent perused the court file only to find out that the matter had been certified ready on the 3rd October, 2018 for hearing on 14th March, 2019 and the matter indeed proceeded for hearing on 14th March, 2019.

c) That the advocate holding brief on behalf of the respondent's advocate one Mss. Oseko failed to diarize the said date as a result of which they failed to attend hearing and the respondent's witnesses were also not informed.

d) That the non- attendance was as a result of an inadvertence on the part of the respondent's advocates who failed to diarize the matter for hearing and attached a copy of their office diary.

e) That the application herein has been brought without undue delay an urged this court in the interest of justice to allow his application.

4. In opposition to the application, the Claimant, **Peter Marando Nyaberi Bichungi** filed his affidavit sworn on 27th March, 2019 in which he avers that, the hearing date in this suit was taken by consent on 3rd October, 2018 with time allocation for hearing slated for 12:30 pm on the 14th March, 2019.

5. The claimant avers that the failure by the respondent's advocate to appear in court together with his witnesses is not as a result of any inadvertence but an act of gross negligence, gross breach of duty to his client or an attempt to delay this suit.

6. That to reopen this suit that had already been closed would be detrimental to him and he thus urged this court to dismiss the application with punitive costs.

7. The application herein was disposed of by way of written submissions with the Respondent Applicant filing on 20th April 2021 and the Claimant/Respondent filing on 5th May, 2021.

Applicant's submissions.

8. The applicant submitted that this Court has wide discretion to reopen hearing in accordance with sound judicial principles and argued that he has met out a case that warrants this Court to exercise its discretion and review and set aside its proceedings of 14th March, 2019. He relied on the case of **Benjamin Mwea Mwanthi –v- East Africa Spectre Limited [2020] eklr** which court allowed a similar application on having been satisfied with the grounds laid out by the applicant.

9. Counsel also cited the case of **Richard Ncharpi Leiyagu –v- Independent Electoral and Boundaries Commission & 2 others[2013] eklr** where the Court held that;

> **"a mistake is a mistake. It is no less a mistake because it is unfortunate slip.it is no less pardonable because it was committed by a senior counsel. The door of justice is not closed because a mistake has been done by a lawyer of experience who ought to have known better. the court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interest of justice dictates so**."

10. Counsel argues that the Claimant is not likely to suffer any prejudice in any case he has not indicated in his replying affidavit that he will suffer any harm if the said proceedings are reopened.

11. The respondent submitted further that this application was filed timeously. He stated that they learned that the matter had proceeding for hearing in their absence upon being served with mention notice on 15th March, 2019 and immediately perused the court file to find out the position of the Court file which indeed hearing had proceeded on 14th March, 2019 and therefore he immediately filed this Application. He relied on the case of **Jonathan Patrick Ondieki Nyangauu –v- Nairobi water & sewage co limited [2017] eklr** where the court allowed similar application as it was demonstrated that the advocate for the party that failed to attend court was a result of a mistake and not a scheme to frustrate the ends of justice.

12. In conclusion, Counsel submitted that he has given the reason for the failing to attend court and urged this Court to exercise its discretion and allow this Application with costs and cited the case of **Jasbir Singh Rai & 3 others –v- Tarlochan Singh Rai & 4 others [2014] eklr.**

Claimant/Respondent's submissions

13. The Respondent submitted from the onset that the Applicant's application is bad in law incurably defective as it seek to rely on a non-existent provision of the Constitution cited as Article 159(1)(d) of the Constitution. Further that even if the said Applicant had intentions of relying on Article 159(2)(d) of the Constitution the same provides that justice shall be administered without undue delay to procedural technicalities which the applicant has failed to indicate which technicality court ought to overlook while administering justice and cited the case of **Jacob Njeru Karuku –v- Njagi Njuguna [2021] eklr** where the court held that.

> **"I note that the applicant, among other provisions of the law, claims that this application has been brought to court under Article 159(2)(d) of the Constitution of Kenya. Article 159(2)(d) of the constitution states that: "(d) Justice shall be administered without undue regard to procedural technicalities." At the outset I wish to state that dismissal of a suit under Order 17 of the Civil Procedure Rules is not a procedural technicality. It constitutes a process underpinned by statutory law. It is a legal imperative that it is exercised judiciously by courts of law.16. The same Article 159 of the Constitution at 2(b) decrees as follows: "Justice shall not be delayed." The sword of Justice cuts both ways. It takes into account the legal rights of all parties. What is good for the goose is good for the gander!"**

14. Counsel argued that the applicant herein was served with a Notice to attend court and they send Ms. Oseko to hold brief and fix the matter for hearing Therefore, the hearing date was taken by consent. this in essence means that the court was right to proceed in absence of the applicant as provided for under Rule 22 of this Honourable Court's Rules.

15. It was submitted that the applicant herein together with his advocate on record are under an obligation as provided under section 3 (3) of the Employment and Labour relations Court Act to assist the court in furtherance of its objective and comply with court directions and Orders. Accordingly, he argues that the applicant herein willfully failed to attend court when they had taken the hearing date by consent only to give a flimsy excuse of not diarizing the hearing date. Counsel further argued that the purpose of Overriding objective principle is to guide the court achieve fair, just, speedy proportional and cost saving disposal of case and not to uproot established principles of procedure as was held in the Court of **Appeal case of Ann Wanjunu –v- Mwihaki Waruiru & 2 others [2018] eklr.**

16. It was submitted further that rule 33 of this Court's Rules which the Applicant herein relied on while making this application contemplates review when a ruling has been delivered by court and not when setting aside proceedings as such the applicant has relied on an inapplicable provision of the law making the application defective.

17. On whiter the applicant has furnished this court with sufficient cause to warrant the issuance of the orders sought. Counsel cited the case of **Parimal –V- Veena [2011] 3SCC 545** which supreme court of India defined "sufficient cause" as;-

> **"sufficient cause" is an expression which has been used in large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore the word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive." However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously".**

18. Accordingly, Counsel submitted that the reason espoused by the applicant at paragraph 5 of its supporting affidavit is not sufficient but more lack of seriousness on the part of applicant in the way he treats these proceedings. Further that it is not always guaranteed that a mistake committed by an advocate will lead to setting aside of court orders and cited the same of **Neeta Gohil- v- Fidelity Commercial Bank Limited (Supra)**.

19. Counsel therefore submitted that the applicant herein has not met out a case that can persuade this Court to exercise its discretion and issue orders sought, he thus urged this Court to dismiss the application herein with costs to the Claimant/Respondent.

20. I have examined all the averments and submissions of the parties. I have looked at the submissions of the applicant explaining how the omission was occasioned.

21. On discovering their mistake, the applicants immediately filed this application wishing to correct their mistake. I am however alive to the fact that the respondents also have a legitimate expectation that their case would be concluded timeously.

22. In order to avoid miscarriage of justice, I will order that the respondent be allowed to re-open his case and call his witness on condition that the claimant is paid his thrown away costs of kshs.100,000/= before the matter proceeds. Costs in the cause.

Ruling delivered virtually this **8TH** day of **JUNE, 2021.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Ms. Ekesa holding brief for Konosi for respondent – present

Ouma for claimant – present

Court assistant - Fred